

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN R. SCHRUBB, SR.,)
Plaintiff,)
v.)
JAMES TILTON, et al,)
Defendants.)

)

No. C 08-2986 TEH (PR)
ORDER OF SERVICE
(Docket No. 2)

Plaintiff, a prisoner of the State of California, currently incarcerated at Kern Valley State Prison in Delano, California, has filed a pro se civil rights complaint under 42 U.S.C. § 1983 alleging deprivation of his property while at Pelican Bay State Prison. Plaintiff has also filed a motion to proceed in forma pauperis, which is GRANTED in a separate order filed simultaneously. (Docket no. 2).

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a defendant who is immune from such relief.” Id., § 1915A(b). Pro se pleadings must be liberally construed, however. Balistreri v.

1 Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

2 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements:
 3 (1) that a right secured by the Constitution or laws of the United States was violated,
 4 and (2) that the alleged violation was committed by a person acting under the color of
 5 state law. West v. Atkins, 487 U.S. 42, 48 (1988).

6 **B. Legal Claims**

7 Plaintiff contends that he was deprived of several items of personal property he
 8 ordered from an approved vendor, including a cap, a pair of shorts and two books that
 9 were inadvertently sent to him instead of his son, the intended recipient. Plaintiff
 10 contends that when the prison enforced a policy that requires inmates to pay for
 11 shipping of items pursuant to 15 C.C.R. § 3191 and disposed of these items when
 12 Plaintiff did not possess sufficient personal funds in his prison account to send them
 13 back to the vendor or to his son, they violated his right to equal protection and due
 14 process of law under the Constitutions of the United States and the State of
 15 California. If the deprivation is not random and unauthorized, but the result of
 16 "established state procedure," the availability of a post-termination tort action does not
 17 necessarily provide due process. See Logan v. Zimmerman Brush Co., 455 U.S. 422,
 18 435-37 (1982) (failure on part of state commission to hold hearing within statutory
 19 time limits not permitted to terminate timely filed claim). Where the state has
 20 procedures designed to control the actions of state officials and the officials act
 21 pursuant to those procedures, the Fourteenth Amendment requires "'an opportunity . . .
 22 granted at a meaningful time and in a meaningful manner,' . . . for a hearing
 23 appropriate to the nature of the case.'" Id. at 437. See also Zimmerman v. City of
 24 Oakland, 255 F.3d 734, 738 (9th Cir. 2001); Armendariz v. Penman, 31 F.3d 860, 866
 25 (9th Cir. 1994), aff'd in part on relevant grounds and vacated in part on other grounds
 26 on reh'g en banc, 75 F.3d 1311 (9th Cir. 1996) (en banc). Therefore, Plaintiff's claims
 27 will be served.

28 Defendants Grannis, Wilber and Bradbury are dismissed from this action, as

1 Plaintiff fails to assert any allegations against them other than, presumably, their
2 denial of his inmate appeals. California Code of Regulations, title 15 sections 1073
3 and 3084 grant prisoners in the county jails and state prisons a purely procedural right:
4 the right to have a prison appeal. A provision that merely provides procedural
5 requirements, even if mandatory, cannot form the basis of a constitutionally
6 cognizable liberty interest. See Smith v. Noonan, 992 F.2d 987, 989 (9th Cir. 1993);
7 see also Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7th Cir. 1996) (prison grievance
8 procedure is procedural right that does not give rise to protected liberty interest
9 requiring procedural protections of Due Process Clause); Buckley v. Barlow, 997 F.2d
10 494, 495 (8th Cir. 1993) (same). Given the absence of any allegations against them
11 other than the denial of his administrative appeals, these named Defendants are
12 DISMISSED from this action.

13 **C. Plaintiff's Responsibility to Effectuate Service**

14 The Court shall direct the United States Marshal to serve copies of the
15 complaint on the remaining named Defendants. Although incarcerated plaintiffs
16 proceeding in forma pauperis may rely on service by the United States Marshal, “a
17 plaintiff may not remain silent and do nothing to effectuate such service. At a
18 minimum, a plaintiff should request service upon the appropriate defendant and
19 attempt to remedy any apparent service defects of which a plaintiff has knowledge.”
20 Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987). If the Marshal is unable to
21 effectuate service through no fault of his own, for example, because Plaintiff failed to
22 provide sufficient information or because Defendant is not where Plaintiff claims, and
23 Plaintiff is informed, Plaintiff must seek to remedy the situation or face dismissal
24 regarding that Defendant pursuant to Federal Rule of Civil Procedure 4(m). See
25 Walker v. Sumner, 14 F.3d 1415, 1421-22 (9th Cir. 1994) (quoting Puett v. Blandford,
26 912 F.2d 270, 275 (9th Cir. 1990)), overruled on other grounds, Sandin v. Connor, 515
27 U.S. 472 (1995). Rule 4(m) provides as follows:

28 If a defendant is not served within 120 days after the

1 complaint is filed, the court - on motion or on its own after
2 notice to the plaintiff - must dismiss the action without
3 prejudice against that defendant or order that service be
4 made within a specified time. But if the plaintiff shows
good cause for the failure, the court must extend the time for
service for an appropriate period.

5 Fed. R. Civ. P. 4(m).

6 Plaintiff has identified the following Defendants as available for service at
7 Pelican Bay State Prison: **Robert Horel, Warden; M. D. Yox, Associate Warden;**
8 **C. E. Ducart, Correctional Officer and A. Spalding, Correctional Officer.** **James**
9 **Tilton, Secretary of the California Department of Corrections and Rehabilitation**
is located in Sacramento, California.

10 CONCLUSION

11 For the foregoing reasons and for good cause shown,

- 12 1. All claims against Defendants Grannis, Wilber and Bradbury are
13 **DISMISSED** and these Defendants are **TERMINATED** from this action.
- 14 3. The Clerk shall issue summons and the United States Marshal shall
15 serve, without prepayment of fees, copies of the complaint in this
16 matter, all attachments thereto, and copies of this order on the remaining
17 Defendants: **Robert Horel, Warden; M. D. Yox, Associate Warden;**
18 **C. E. Ducart, Correctional Officer and A. Spalding, Correctional**
19 **Officer at Pelican Bay State Prison, as well as James Tilton,**
20 **Secretary, at the California Department of Corrections and**
21 **Rehabilitation in Sacramento, California.** The Clerk shall also mail
22 courtesy copies of the complaint and this order to the California
23 Attorney General's Office and a copy of this order on Plaintiff.
- 24 4. No later than **sixty (60) days** from the date of this order, Defendants
25 shall file a motion for summary judgment or other dispositive motion
26 with respect to the claims found to be cognizable above.
27 a. If Defendants elect to file a motion to dismiss on the grounds

1 Plaintiff failed to exhaust his available administrative remedies as
2 required by 42 U.S.C. § 1997e(a), Defendants shall do so in an
3 unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315
4 F.3d 1108, 1119-20 (9th Cir.), cert. denied, 540 U.S. 810 (2003).

5 b. Any motion for summary judgment shall be supported by
6 adequate factual documentation and shall conform in all respects to Rule
7 56 of the Federal Rules of Civil Procedure. Defendants are advised that
8 summary judgment cannot be granted, nor qualified immunity found, if
9 material facts are in dispute. If any Defendant is of the opinion that this
10 case cannot be resolved by summary judgment, he shall so inform the
11 Court prior to the date the summary judgment motion is due.

12 5. Plaintiff's opposition to the dispositive motion shall be filed with the
13 Court and served on Defendants no later than **thirty (30) days** from the date
14 Defendants' motion is filed.

15 a. In the event Defendants file an unenumerated motion to dismiss
16 under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

17 The defendants have made a motion to dismiss pursuant to Rule 12(b)
18 of the Federal Rules of Civil Procedure, on the ground you have not
19 exhausted your administrative remedies. The motion will, if granted,
20 result in the dismissal of your case. When a party you are suing makes
21 a motion to dismiss for failure to exhaust, and that motion is properly
22 supported by declarations (or other sworn testimony) and/or
23 documents, you may not simply rely on what your complaint says.
Instead, you must set out specific facts in declarations, depositions,
answers to interrogatories, or documents, that contradict the facts
shown in the defendant's declarations and documents and show that
you have in fact exhausted your claims. If you do not submit your own
evidence in opposition, the motion to dismiss, if appropriate, may be
granted and the case dismissed.

24 b. In the event defendants file a motion for summary judgment, the
25 Ninth Circuit has held that the following notice should be given to

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27 ¹ The following notice is adapted from the summary judgment notice to be
28 given to pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir.
1998) (en banc), cert. denied, 527 U.S. 1035 (1999). See Wyatt, 315 F.3d at 1120 n.14.

1 plaintiffs:

2 The defendants have made a motion for summary judgment by which
3 they seek to have your case dismissed. A motion for summary
4 judgment under Rule 56 of the Federal Rules of Civil Procedure will, if
5 granted, end your case.

6 Rule 56 tells you what you must do in order to oppose a motion for
7 summary judgment. Generally, summary judgment must be granted
8 when there is no genuine issue of material fact--that is, if there is no
9 real dispute about any fact that would affect the result of your case, the
10 party who asked for summary judgment is entitled to judgment as a
11 matter of law, which will end your case. When a party you are suing
12 makes a motion for summary judgment that is properly supported by
declarations (or other sworn testimony), you cannot simply rely on
what your complaint says. Instead, you must set out specific facts in
declarations, depositions, answers to interrogatories, or authenticated
documents, as provided in Rule 56(e), that contradict the facts shown in
the defendants' declarations and documents and show that there is a
genuine issue of material fact for trial. If you do not submit your own
evidence in opposition, summary judgment, if appropriate, may be
entered against you. If summary judgment is granted in favor of
defendants, your case will be dismissed and there will be no trial.

13 See Rand, 154 F.3d at 963. Plaintiff is advised to read Rule 56 of the Federal
14 Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)
15 (party opposing summary judgment must come forward with evidence
16 showing triable issues of material fact on every essential element of his claim).

17 Plaintiff is cautioned that failure to file an opposition to Defendants' motion
18 for summary judgment may be deemed to be a consent by Plaintiff to granting
19 the motion, and granting of judgment against Plaintiff without a trial. See
20 Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.) (per curiam), cert. denied, 516
21 U.S. 838 (1995); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

22 6. Defendants shall file a reply brief no later than **fifteen (15) days** after
23 Plaintiff's opposition is filed.

24 7. The motion shall be deemed submitted as of the date the reply brief is
25 due. No hearing will be held on the motion unless the Court so orders at a
26 later date.

27 8. All communications by the Plaintiff with the Court must be served on
28 Defendants, or Defendants' counsel once counsel has been designated, by

1 mailing a true copy of the document to Defendants or Defendants' counsel.

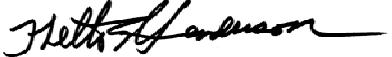
2 9. Discovery may be taken in accordance with the Federal Rules of Civil
3 Procedure. No further court order under Federal Rule of Civil Procedure
4 30(a)(2) or Local Rule 16-1 is required before the parties may conduct
5 discovery.

6 10. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep
7 the Court and all parties informed of any change of address by filing a
8 separate document titled "Notice of Change of Address" and must comply
9 with the Court's orders in a timely fashion. Failure to do so may result in the
10 dismissal of this action under Federal Rule of Civil Procedure 41(b).

11 11. Extensions of time must be filed no later than the deadline sought to be
12 extended and must be accompanied by a showing of good cause.

13 SO ORDERED.

14 DATED: 01/15/09


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THELTON E. HENDERSON
16 United States District Judge

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